IN THE SUPREME COURT OF THE STATE OF KANSAS

AUDUBON OF KANSAS, INC.	)	
	)	
Petitioner,	)	
	)	
v.	)	Original Action No. _____
	)	
EARL B. LEWIS, in his official capacity as Chief Engineer, Kansas Department of Agriculture, Division of Water Resources,	)	
	)	
Respondent.	)	
	)	

MEMORANDUM IN SUPPORT OF AUDUBON OF KANSAS, INC'S PETITION FOR WRIT OF MANDAMUS AND DECLARATORY JUDGMENT

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INTRODUCTION

The Quivira National Wildlife Refuge ("Refuge") is a wetland of international importance. Its saline wetlands provide critical shelter and habitat for numerous threatened and endangered species, including the whooping crane, the piping plover, the interior least tern, and the bald eagle. To protect these wetlands, the U.S. Fish & Wildlife Service ("Service"), which owns the Refuge, obtained a water right ("Refuge Water Right") pursuant to the Kansas Water Appropriation Act, K.S.A. 82a-701 *et seq.* ("KWAA"). The Refuge Water Right has a 1957 priority entitling the Service to divert over 14,000 acre-feet per year ("AF/Y") from Rattlesnake Creek, a tributary of the Arkansas River. These water supplies depend upon groundwater within the Rattlesnake Creek Basin ("Basin"). But since 1957, the chief engineer of the Kansas Department of Agriculture, Division of Water Resources ("KDA-DWR") has granted more water rights than the Basin can sustain—a condition known as over-appropriation. After decades of groundwater pumping by junior rights, Rattlesnake Creek barely runs, crippling the Refuge Water Right.

In 2013, the Service finally decided to protect the Refuge Water Right by filing a request with KDA-DWR to conduct an impairment investigation. After three years of study, the previous chief engineer, David W. Barfield, issued an authoritative impairment report ("Report," excerpted as **Exhibit C**) which reached two essential conclusions. First, the Refuge Water Right is chronically and seriously impaired by junior groundwater pumping, which has been depleting the Basin of between 30,000 and 60,000 AF/Y for years.[1] Second, the impairment can be resolved by

[1] This is an extraordinary level of depletion. By way of comparison, it vastly exceeds the annual violations of the Pecos River Compact due to over-pumping by New Mexico between 1950 and 1983, *Texas v. New Mexico,* 482 U.S. 124, 127-28 (1987) (approximately 10,000 AF/Y); and the annual depletions of stateline flows suffered by Kansas due to groundwater pumping by Colorado in violation of the Arkansas River Compact between 1950 and 1996, *Kansas v. Colorado,* 556 U.S. 98, 103 (1999) (approximately 9,106 AF/Y). The groundwater depletions at the Refuge likely exceed Nebraska's overuse due to groundwater pumping in violation of the Republican River Compact, *Kansas v. Nebraska,* 135 S. Ct. 1042, 1053 (2015) (approximately 35,435 AF/Y for 2005 and 2006)—the largest annual interstate compact violations due to groundwater pumping in the history of interstate compact litigation.

reducing juniors' groundwater pumping in the Basin. **Exhibits C, M**. The Impairment Report is conclusive: its data, groundwater modeling, and technical analyses have not been questioned.

For the next seven years, the Service and KDA-DWR vacillated about whether and how to protect the Refuge Water Right. The Service filed repeated requests to secure water in the wake of the Impairment Report. **Exhibits F, L**. By 2019, chief engineer Barfield developed a comprehensive plan to administer junior water rights according to the analyses and findings of the Impairment Report. On February 6, 2023, the Service filed its most recent request to secure water—well in advance of irrigation season, which typically begins in late May. **Exhibit Q**. Yet in April, shortly before irrigation season was to begin, chief engineer Lewis issued a public statement promising junior water rights holders in the Basin that he would not administer their rights in 2023. **Exhibit S**.

This Court cannot condone the chief engineer's refusal to perform his clear, mandatory, and non-discretionary duty to protect senior water rights. Since 1945, the bedrock principle of the KWAA has been clear and uncompromising: "first in time, first in right," without regard for economic consequences. K.S.A. 82a-707(c); *Garetson Bros. v. American Warrior, Inc.*, 51 Kan.App.2d 370, 381-82, 347 P.3d 687 (2015). The chief engineer has exclusive jurisdiction over water rights and shall administer them "in accordance with the rights of priority of appropriation." K.S.A. 82a-706. When he concludes that a senior right is impaired—when pumping by junior rights "diminishes, weakens, or injures the prior right," *Garetson,* 51 Kan.App.2d at 389—and the senior water right holder files a request to secure water, the chief engineer must immediately protect the senior water right by shutting down juniors' diversions. K.S.A. 82a-706b. The entire prior appropriation system depends upon the performance of this duty, which prevents unlawful diversions by junior rights. *Id.* Without it, our system of property rights in water use breaks down.

The priority of a water right is the "most important stick in the water rights bundle." *Navajo Dev. Co., Inc. v. Sanderson,* 655 P.2d 1374, 1377-78 (Colo. 1982). Priority is "property in itself," a water right's "chief value," and so to deprive a senior right of its priority is to take "a most valuable property right." *High Country Citizens' Alliance v. Norton,* 448 F.Supp.2d 1235, 1253 (D. Colo. 2006). There is no clearer example in Kansas law of a public officer's mandatory, non-discretionary duty.

Petitioner seeks an order directing Respondent Lewis to administer immediately all junior water rights in the Basin that are impairing the Refuge Water Right until the right is no longer impaired, as well as several declarations clarifying this duty. Former chief engineer Barfield authored the 2016 Impairment Report and the 2019 administration plan. In developing both, the chief engineer enjoys discretion owing to his water resources expertise; he is a classified officer. K.S.A. 74-506d. But paralysis cannot follow analysis. Upon a finding of impairment and a senior's request to secure water, the chief engineer must immediately act. There is no legal or factual basis to avoid or delay priority administration in the Basin.

Respondent's refusal is the latest example of KDA-DWR intentionally failing to administer junior water rights in the Basin over the past four decades. The Court's immediate intervention is necessary to protect the rule of law and to resolve this significant public issue before another year of drought inflicts irreparable harm to the Refuge, the Refuge Water Right, and the endangered and threatened species which rely upon both. Junior irrigators may experience inconvenience and additional economic burden as a result of priority administration, but they have no legal basis for contesting it. Had the chief engineer acted as the law requires, they could have avoided or limited the consequences of his inaction. Accordingly, Petitioner respectfully requests the Court to review this matter and issue a writ and declaratory relief as expeditiously as possible.

STATEMENT OF FACTS

Petitioner AOK has fully set forth the relevant facts of this case in its Petition, and hereby incorporates the same and all exhibits discussed therein into this Memorandum by reference.

ARGUMENT & AUTHORITIES

I. Mandamus by the Supreme Court is appropriate in this case.

a. Legal Standard.

An original action in mandamus is an appropriate vehicle to compel the performance of a clearly defined duty unlawfully withheld by a public officer. K.S.A. 60-801; *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 697, 957 P.2d 379 (1998). A mandamus order can only compel "ministerial" acts, those which the officer must perform "upon a given set of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion about the propriety or impropriety of the act to be performed." *Schmidtlien Elec., Inc. v. Greathouse*, 278 Kan. 810, 833, 104 P.3d 378 (2005).

While a private person is not typically entitled to invoke mandamus to compel the performance of a duty owed to the public generally, the oft-stated exception exists for cases where the petitioner shows an "injury or interest specific and peculiar to himself, and not one that he shares with the community in general." *Stephens v. Van Arsdale*, 227 Kan. 676, 683, 608 P.2d 972 (1980). Furthermore, this Court has recognized that:

> Mandamus is a proper remedy where the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of the public business, notwithstanding the fact there also exists an adequate remedy at law.
>
> The use of mandamus to secure a speedy adjudication of questions of law for the guidance of state officers and official boards in the discharge of their duties is common in this state.

Stephens, 227 Kan. at 682 (quoting *Mobil Oil Corp. v. McHenry*, 200 Kan. 211, 239, 436 P.2d 982 (1968)).

b. Petitioner holds an interest specific and peculiar to itself that is threatened by Respondent's failure to protect the Refuge Water Right.

As stated above, a private individual must show "an injury or interest peculiar to himself" for the remedy of mandamus to be available, and "[w]hether or not a private individual has brought himself within the narrow limits of the well-established rule must be determined from the particular facts of each individual case." *Mobil Oil Corp. v. McHenry*, 200 Kan. 211, 243, 436 P.2d 982 (1968). In other words, Petitioner must show it has standing to sue. Petitioner's particular interest in the enforcement of the prior appropriation doctrine under the KWAA, necessary for the protection of the Refuge Water Right, undoubtedly satisfies the standard.

Petitioner holds a strong interest in the survival of the Refuge, and regularly hosts events there as part of its educational initiatives to encourage its members and the public to appreciate the Refuge and the many endangered and threatened species that rely upon it. Since at least 2016, Petitioner has dedicated extensive resources and time towards protection of the Refuge. From its series of advocacy letters exchanged with KDA-DWR to the pursuit of its federal lawsuit, AOK has placed itself squarely in the middle of the controversy surrounding the Refuge Water Right. *See* **Exhibits G, H, J, K**. Its standing to seek declaratory and injunctive relief in federal court on these grounds was never disputed. *Audubon of Kansas, Inc. v. United States Dep't of Interior*, 67 F.4th 1093 (10th Cir. 2023); *Audubon of Kansas, Inc. v. United States Dep't of Interior*, 568 F.Supp.3d 1167 (D. Kan. 2021).

c. Respondent's refusal to administer junior water rights in the Basin is clearly a recurring and ongoing issue of significant statewide concern.

It is unlawful for KDA-DWR to delay protection of the Refuge Water Right after ten years and in the face of repeated requests to secure water, because delay enables further unlawful diversions by junior rights. K.S.A. 82a-706b. KDA-DWR has rationalized delay on the grounds that the interests of junior water right holders, agribusinesses, and their lobbies take priority over the Refuge Water Right. *See, e.g.,* **Exhibit E**. This rationalization is sound politics, but it is legally groundless.

"The date of priority of every water right of every kind, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights." K.S.A. 82a-707(b). Economic considerations play no role in the state's duty to protect senior water rights from impairment by junior rights. *Garetson Bros. v. American Warrior, Inc.*, 51 Kan.App.2d 370, 388-89, 347 P.3d 687 (2015). As Justice Oliver Wendell Holmes stated, "few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished." *Hudson Cnty. Water Co. v. McCarter,* 209 U.S. 349, 356 (1908). The waters of Kansas and the water rights that depend upon them face grave risk if the chief engineer is allowed to skirt his clear, non-discretionary duty.

d. There is no other adequate remedy at law available to Petitioner.

Mandamus has typically been viewed as a proper remedy only where a party has "a want of any other appropriate and adequate remedy." *See State v. McDaniels*, 237 Kan. 767, 771-72, 703 P.2d 789 (1985). Petitioner clearly lacks any adequate remedy to challenge the inaction of the chief engineer in this case. Petitioner does not own a water right in the Basin, and is instead seeking to protect the water right held by a federal agency. No provision of the KWAA confers

standing on Petitioner to seek administrative review of the chief engineer's decisions in such circumstances, nor is there any applicable provision of the Kansas Judicial Review Act, K.S.A. 77-601 *et seq.*, that confers statutory standing to pursue the relief sought. Finally, as described more fully in Section II.f below, mandamus is a long-accepted procedure in prior appropriation jurisdictions for protecting senior water rights impaired by juniors.

e. The Court should exercise its original jurisdiction in this case.

To support an original mandamus action in the Supreme Court, the petitioner must state why the action should be considered there instead of the district court. Kan. Sup. Ct. R. 9.01(b). Adequate relief in this case requires the Supreme Court's exercise of its discretionary jurisdiction for three reasons. First, there is a pressing need for speed, to protect the Refuge. "Without question, if this court declines to exercise jurisdiction in this action, it will be faced with the identical issue in a subsequent appeal from an action before the district court." *State ex rel. Stephan v. Kansas House of Representatives,* 236 Kan. 45, 53, 687 P.2d 622 (1984). Judicial economy, the need for a speedy adjudication of an issue, and avoidance of needless appeals merit the Supreme Court's discretionary jurisdiction here. *Ambrosier v. Brownback,* 304 Kan. 907, 909, 375 P.3d 1007 (2016). Time is of the essence in this case due to the severity of the Refuge Water Right's impairment. If the chief engineer does not protect the Refuge Water Right, the Refuge and its dependent endangered species are at risk.

Second, delay threatens serious legal consequences for the State of Kansas. If the chief engineer continues to refuse to protect the Refuge Water Right, and significant habitat modification or degradation kills or injures whooping cranes or other endangered species as a result, then the State of Kansas will be subject to substantial criminal and civil penalties pursuant to the federal Endangered Species Act, which forbids the "take" of an endangered species by direct or indirect

actions. 16 U.S.C. 1538(a)(1)(B); 50 C.F.R. 17.3 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. For a Great Oregon,* 515 U.S. 687, 704 (1995); *Aransas Project v. Shaw,* 775 F.3d 641, 646 (5th Cir. 2014). Harm to whooping cranes, other endangered species, and the habitat of the Refuge resulting from the continuing impairment of the Refuge Water Right are not only foreseeable; they have been foreseen for decades and described by KDA-DWR itself. **Exhibit C**.

Third, this case raises issues of the greatest public importance statewide. There is an obvious need for an authoritative interpretation of the chief engineer's duties under the KWAA to expedite the resolution of this important issue of public concern. *Wilson v. Sebelius*, 276 Kan. 87, 90, 72 P.3d 553 (2003) (stating "[n]umerous prior decisions have recognized mandamus is a proper remedy where the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of public business, notwithstanding the fact that there also exists an adequate remedy at law"). The KWAA dedicates "[a]ll water within the state of Kansas . . . to the use of the people of the state . . . ." K.S.A. 82a-702. The chief engineer "shall enforce and administer the laws of this state pertaining to the beneficial use of water and shall control, conserve, regulate, allot and aid in the distribution of the water resources . . . in accordance with the rights of priority of appropriation." *Id.,* 82a-706. K.S.A. 82a-706b clearly requires the chief engineer to immediately administer junior rights. This Court must state plainly that the law means what it says—and order that the law be enforced.

II. The KWAA confers upon the chief engineer the non-discretionary duty to administer immediately junior water rights whenever he determines that they are impairing a senior right and the holder of that right files a request to secure water.

a. The non-discretionary duty to immediately administer junior rights has been a fundamental component of Kansas water law since 1886.

The inaction of Respondent contradicts over 130 years of explicit and consistent law in Kansas. In 1886, Kansas adopted the prior appropriation doctrine for western Kansas. L. 1886,

ch. 115, § 1; K.S.A. §§ 42-301 to 42-311. Article IV of Chapter 133 of the Laws of 1891, subsequently brought into the Revised Statutes of 1923, appears in its present form at K.S.A. 42-329, and is the bedrock of the non-discretionary duty to immediately administer junior rights:

> The waters of the several streams and sources of supply shall be distributed among the several canals, ditches, conduits and other works so that the proprietors of each of said works, and those entitled to water therefrom, shall, as nearly as may be, and to the extent of their needs, at all times receive and enjoy the waters to which they are severally entitled; and whenever it shall appear that there is flowing into any such works, water to which the proprietor of any other such works having a prior right is entitled, and that such other works having priority of right is not receiving the water necessary for the consumers of water therefrom, and which ought to flow to the same, the head gate of such works having the excess, and being subsequent in right, shall be closed or partly closed, so that a sufficient amount of water of such stream or source of supply may pass and flow to the said works having the priority of right, to the amount to which the same shall be entitled; and if the proprietors of any such works having such excess and being subsequent in right shall fail or refuse to turn out such supply of water when requested by the party entitled to receive the same so to do, the head gate or waste gate of the works receiving such excess shall be so set and locked by the officer authorized by law to perform such duty as to permit a sufficient amount of said water to pass and flow to the party having the right to receive the same.

K.S.A. 42-329. The legislature retained this statute with the enactment of the KWAA in 1945, and alongside the KWAA's significant amendments in 1957. As detailed further below, its clear statement of duty served as a blueprint for K.S.A. 82a-706b. Indeed, as the Kansas Water Resources Board ("Water Board") emphasized, "[s]o significantly interesting are the provisions of this section pertaining to administration of water rights that there is compelling need to reproduce this section." KANSAS WATER RESOURCES BOARD, REPORT ON THE LAWS PERTAINING TO THE BENEFICIAL USE OF WATER 108 (1956) ["1956 REPORT"].

Five aspects of K.S.A. 42-329 are notable. First, as indicated by the repeated use of the imperative "shall," the statute imposes a non-discretionary duty. Second, it requires that senior water rights "at all times" receive the waters to which they are entitled, "and to the extent of their

needs." Third, the statute imposes a duty to act immediately, "whenever" junior water rights are diverting and the senior water right is not receiving its necessary water supplies.[2] Fourth, it explicitly states the manner the duty is to be accomplished, by physically closing juniors' diversion works. Finally, it states a clear penalty for noncompliance: if juniors refuse the senior's request to secure water, juniors' diversion works shall be locked by "the officer authorized by law to perform such duty . . . ." K.S.A. 42-329.

Who, then, is the "officer authorized by law" to perform this immediate and non-discretionary duty? Between 1891 and 1945, it was the district courts, which held exclusive jurisdiction to protect senior rights through the appointment of water bailiffs authorized to shut down juniors' diversions. K.S.A. 42-3,109. During this time, Kansas reformed its water law bureaucracy, first establishing the Kansas water commission in 1917 (L. 1917, Ch. 172) and then consolidating it with the division of irrigation in creating KDA-DWR in 1927. L. 1927, Ch. 293, § 1; K.S.A. 74-506a. All duties, powers, and authority of these earlier agencies were transferred to KDA-DWR, and the former commissions were abolished. L. 1927 Ch. 293, §§ 2-3, K.S.A. §§ 74-506b, 74-506c.

With the enactment of the KWAA in 1945, K.S.A. 42-3,109, was abolished, but the legislature retained K.S.A. 42-329 and its requirement to immediately administer junior water rights when required to satisfy prior rights. However, the officer charged with performing that duty was not made explicit, despite the general delegation under the KWAA of enforcement authority to the chief engineer pursuant to K.S.A. 82a-706. In 1956, the Water Board stressed the need for clarity on the issue:

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[2] A contemporary statute, still in effect at K.S.A. 42-398, affirms the immediacy of this duty: it authorizes water bailiffs and other officers to "enter upon any premises where such [junior] well is situated," and "at "any reasonable hour of the day or night . . . ."

> This much seems certain: Operation under G.S. 1949, 42-329—which pertains to administration—would strengthen the meaning and effect of all water rights in the state, would give needed protective assistance to state water users, and would further the interests of the state in water conservation, in the prevention of waste, and in the efficient management of the water resources of the state. To insure application of the statute, the legislature could simply and clearly designate the state officer authorized, empowered, and directed to carry out the duties specified in G.S. 1949, 42-329. Its logical choice, of course, would be the officer who is in the best position to carry out those duties—the officer who deals constantly with the determination, approval, and regulation of water rights—the man whose office contains the technical data necessary to effectuate the policies declared—the chief engineer of the division of water resources of the state board of agriculture.

1956 REPORT, at 110. In recommending draft legislation, the board explicitly tied K.S.A. 42-329 to the new legislation conferring this duty squarely upon the chief engineer. *Id.*, at 116-17.

The legislature generally agreed with this recommendation, and in 1957 enacted K.S.A. 82a-706b. While K.S.A. 82a-706 sets forth general duties of the chief engineer, Section 706b speaks specifically to the chief engineer's duty to administer junior rights in language substantively identical to the requirements set forth in K.S.A. 42-329. Its original and relevant passages are as follows:

> (a) It shall be unlawful for any person to prevent, by diversion or otherwise, any waters of this state from moving to a person having a prior right to use the same . . . . Upon making a determination of an unlawful diversion, the chief engineer or the chief engineer's authorized agents, shall, as may be necessary to secure water to the person having the prior right to its use . . . :
>
> (1) Direct that the headgates, valves or other controlling works of any ditch, canal, conduit, pipe, well or structure be opened, closed, adjusted or regulated . . . .
>
> (b) The chief engineer, or the chief engineer's authorized agents, shall deliver a copy of such a directive to the persons involved either personally or by mail or by attaching a copy to such headgates, valves or other controlling works to which it applies and such directive shall be legal notice to all persons involved in the diversion and distribution of the water of the ditch, canal, conduit, pipe, well or structure. For the purpose of making investigations of diversions and delivering directives as provided herein and determining compliance therewith, the chief engineer or the chief engineer's authorized agents shall have the right of access and entry upon private property.

K.S.A. 82a-706b. The statute incorporated other statutory language contained in Chapter 42, most notably those forbidding and penalizing unauthorized diversions by junior rights, and entitling senior rights to immediate relief. *See, e.g.*, K.S.A. §§ 42-395 to 42-399, 42-3,100 to 42-3101. It has been properly described as a "mandate" by legal scholars. WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES III.307 (1972-77). In 1965, the legislature amended the statute to incorporate the protection of water reservation rights. L. 1965, ch. 557, § 1. In 2015, it was amended to allow for "augmentation," an alternative that, as described below and in the Petition, does not apply in this case. L. 2015, ch. 60, § 1.

This history indicates over 130 years of the legislature's consistent and unwavering commitment to the immediate protection of senior water rights from the illegal and impairing diversions by junior rights. K.S.A. 82a-706b articulates precisely what has been Kansas law since 1886, and imposes that clear, non-discretionary duty upon the chief engineer.

b. All of the statutory and regulatory requirements for engaging the chief engineer's duty to administer junior rights have been met: there are no alternatives or exceptions to priority administration.

K.S.A. §§ 82a-706, 82a-706b, and K.A.R. 5-4-1 work in tandem to protect senior water rights. *Garetson Bros. v. American Warrior, Inc.,* 51 Kan.App.2d 370, 382, 347 P.3d 687, 694-95 (2015). The Service requested an impairment investigation pursuant to K.A.R. 5-4-1(a) in 2013, which former chief engineer Barfield completed with the publication of a final impairment report pursuant to K.A.R. 5-4-1(b)-(c). **Exhibit C**. The Service has repeatedly filed requests to secure water pursuant to K.A.R. 5-4-1(d), most recently in 2023. **Exhibits F, L, Q**. Because the Refuge Water Right holds the beneficial use of recreational use, the Service's requests do not expire, unlike requests to secure water to satisfy irrigation use rights. K.A.R. 5-4-1(d). In sum, the Service

fulfilled all regulatory requirements to trigger action from the chief engineer pursuant to his general duties under K.S.A. 82a-706 and his specific duties under 82a-706b.

There is no legal justification for the Respondent's present delay and inaction. In 2016 chief engineer Barfield determined that the Refuge Water Right is impaired pursuant to K.A.R. 5-4-1(c), thereby "making a determination of an unlawful diversion" by junior rights pursuant to K.S.A. 82a-706b(a). **Exhibit C**. Thus, the chief engineer "shall direct" the junior rights to be shut down, K.S.A. 82a-706b(a)(1), and "shall give a written notice and directive" to junior water rights whose "use of water must be curtailed to secure water to satisfy the complainant's prior rights." K.A.R. 5-4-1(e)(1). The local groundwater management district has been repeatedly consulted pursuant to K.A.R. 5-4-1(e)(2). **Exhibits D, E, F, H, I K, M, R**.

Because the Service has fully complied with K.A.R. 5-4-1, the chief engineer must immediately administer junior water rights that are impairing the senior right. K.S.A. 82a-706b(a)(1). The alternative to priority administration, that of "augmentation" pursuant to K.S.A. 82a-706b(a)(2), is not available, for the reasons and facts stated in the Petition. Thus, there is no alternative for the Respondent than to immediately issue curtailment orders shutting down junior rights pursuant to K.S.A. 82a-706b and K.A.R. 5-4-1(e)(1).

c. Respondent recognizes that this duty is non-discretionary.

Respondent Lewis has dedicated his career to serving the state in water matters, at both KDA-DWR and the Kansas Water Office. As the current chief engineer, he has repeatedly testified before the Kansas Legislature. On March 7, 2023, he testified to the House Water Committee. His testimony demonstrates his understanding that his duty to protect the Refuge Water Right is not discretionary:

Chief Engineer Lewis: The purpose of the impairment and then the call for water is really, it's a regulatory process, right? But the regulatory process rests with the division of water resources and the chief engineer. So I think the court getting involved really. . . the situation there could be if we don't do our statutory duty . . . then I think we are open to litigation, uh primarily by a senior water holder. And again this is just in anywhere and not just in this case.

But if we don't do our duty as laid out in 706b where it says we shall take action, then I think the court could step in . . . . We have a whole host . . . I think their options are much more strict "first in time, first in right."

And again just to kind of give you a scope, we've been participating in the environmental assessment . . . hopefully leading to an augmentation project, and one of the things they have to look at is what if it doesn't happen? . . . The modeling would say that to do a strict first in time first in right, we need to shut off on the order of 810 wells for no less than two years in order to get that water level to recover to a point where the streamflow is being supported to a level that the Refuge's water right can be sustained . . . certainly we want to avoid that if possible . . . .

. . .

Representative Bloom: The junior wells, they're all used for food production, right?

Chief Engineer Lewis: Not all of them.

Representative Bloom: What are they used for?

Chief Engineer Lewis: Well, the majority are for irrigation, but I mean there's certainly stock water, there's municipal, there's some other recreation. The majority are for irrigation though.

. . .

Representative Bloom: And the world's food supply is, like, two weeks. In your opinion, when does food trump recreation?

Chief Engineer Lewis: Under the law? Never. It is first in time first in right regardless of use . . . It is first in time first in right regardless of what type of use, regardless of what type of economic activity it is, regardless of anything other than "who got the water right first, who got it second." It's a very harsh system, but it's a system that's used across the western United States.

KS Legislature, *House Water Committee 03/07/2023*, YouTube (March 7, 2023), https://www.youtube.com/watch?v=3oU8oqZMZnc&t=1832s (1:04:36 – 1:08:00).

Respondent knows that the law requires him to act, how the law requires him to act, and that his statutory duty does not permit "his own judgment or opinion about the propriety or impropriety of the act to be performed" to prevent him from acting. *See Schmidtlien Elec., Inc. v. Greathouse*, 278 Kan. 810, 833 104 P.3d 378 (2005).

d. The immediate administration of junior rights to protect an impaired senior right is also the correct remedy for common-law actions taken pursuant to K.S.A. §§ 82a-716, 82a-717a, and 82a-706d.

Parts II.a-b explained how Kansas law has long provided for the immediate protection of senior water rights by a state officer. K.S.A. §§ 42-329, 82a-706b. The KWAA contains a parallel procedure, located at K.S.A. §§ 82a-716 and 717a, for "common law claimants" to protect their property rights. These statutes, enacted as part of the KWAA in 1945, allow senior water rights holders to obtain compensation from and injunctive relief against junior rights holders by pursuing actions directly in the district courts. K.S.A. 82a-716. During the pendency of the chief engineer's investigations, the complainant may petition the chief engineer for a temporary curtailment order shutting down junior rights. K.S.A. 82a-717a(b)(3).

In *Garetson Bros. v. American Warrior, Inc.,* 51 Kan.App.2d 370, 347 P.3d 687 (2015) (*"Garetson I"*), and again in *Garetson Brothers v. American Warrior, Inc.,* 56 Kan.App.2d 623, 435 P.3d 1153 (2019) (*"Garetson II"*), the Kansas Court of Appeals resolved a dispute between a senior water rights holder and a junior water rights holder, arising under K.S.A. §§ 82a-716 and 82a-717a. The case construed these statutory sections according to the bedrock principle of "first in time, first in right," K.S.A. 82a-707(c), and explicitly rejected the junior's claims that courts should consider economic equities in fashioning an appropriate remedy for the impaired senior right. *Garetson I,* 51 Kan.App.2d at 388-89. In *Garetson I,* the Court of Appeals affirmed the trial court's granting of a temporary injunction forbidding the junior right from pumping; in *Garetson*

II, it affirmed the trial court's granting of a permanent injunction ordering the same. *Id.,* at 392; *Garetson II,* 56 Kan.App.2d at 653.

The *Garetson* decisions are relevant to this case for three reasons. First, they correctly applied and enforced the non-negotiable rule of "first in time, first in right" as required by the KWAA, regardless of economic consequences. K.S.A. §§ 82a-707(c), 707(b); *Garetson I,* at Syll. ¶ 6, 381. Second, they established a straightforward definition for what "impairment" means: it is the condition suffered by a prior right when diversion by junior rights "diminishes, weakens, or injures the prior right." *Garetson I,* 51 Kan.App.2d at 389; *Garetson II,* 56 Kan.App.2d at 650.

Third, these decisions affirmed the district court's prompt issuance of injunctive relief upon a finding of impairment. In *Garetson I,* KDA-DWR issued a preliminary impairment finding on April 3, 2013; the plaintiff promptly filed for a temporary injunction shutting down the junior right. On May 16, the trial court held an evidentiary hearing on the motion, and issued its first temporary injunction the very next day—a mere six weeks after the impairment finding by KDA-DWR. *Garetson I,* at 374. After KDA-DWR issued its final impairment report on March 31, 2014, affirming its earlier determination, the trial court considered plaintiff's second motion for a temporary injunction, and issued it on May 5, 2014—five weeks after the final impairment finding. *Garetson II,* at 628. After *Garetson I* was decided (On April 3, 2015), the trial court conducted a three-day trial in October 2016, and on February 1, 2017, it issued a permanent injunction against the junior right—less than four months after trial. *Garetson Brothers vs. Unruh et al.,* Haskell Co. Dist. Ct. No. 2021-CV-09 (February 1, 2012). The *Garetson* cases are textbook examples of the prior appropriation doctrine in practice. REED D. BENSON, BURKE W. GRIGGS, & A. DAN TARLOCK, WATER RESOURCES MANAGEMENT 351-56 (8th ed. 2020).

They also reveal, by contrast, KDA-DWR's open dereliction of its statutory duties. K.S.A. 82a-706b and K.A.R. 5-4-1 set forth the rules and procedures for the chief engineer to determine and resolve impairment. The plaintiffs in *Garetson I* and *II* chose the parallel, slower, procedures of K.S.A. §§ 82a-716 and 717a—by going to court instead of KDA-DWR. Yet they were twice able to obtain injunctive relief shutting down junior wells *less than six weeks* after KDA-DWR had determined impairment. Unlike the chief engineer, who must be an expert in water resources management and who leads an entire division full of "expert assistants," K.S.A. 74-506d, district court judges rarely have such expertise. Why, then, has KDA-DWR delayed, despite its expertise, and despite the immediate duties and procedures required and prescribed by K.S.A. 82a-706b and K.A.R. 5-4-1? Political pressures by Kansas Governors, secretaries of agriculture, and Senator Moran played a significant role in intimidating the chief engineer's office from exercising his duties as the law requires. **Exhibits E, I, K, N, R, S.** But the chief engineer has no legal excuse. Ever since KDA-DWR determined that the Refuge Water Right was impaired in 2016, the Service has repeatedly filed numerous annual requests to secure water. **Exhibits F, L.** It filed its most recent request on February 10, 2023—nearly five months ago. **Exhibit Q.** Given the long-recognized severity of the Refuge Water Right's impairment and the clear mandates for immediate action described in K.S.A. §§ 42-329 and 82a-706b, this Court must order KDA-DWR to act immediately.

Finally, upon request of the chief engineer, "the attorney general shall bring suit in the state of Kansas, in courts of competent jurisdiction to enjoin the unlawful appropriation, diversion, use of the waters of the state, and waste or loss thereof." K.S.A. 82a-706d. While the attorney general is a distinct office from the chief engineer, the use of the term "enjoin" further affirms the need for

immediate administration, as recognized by the Kansas legislature in 1957, when it enacted both K.S.A. 82a-706b and 82a-706d. L. 1957, ch. 539, §§ 10, 12.

e. The Tenth Circuit's recent construction of the chief engineer's immediate and non-discretionary duties pursuant to K.S.A. 82a-706b is correct.

The United States Court of Appeals for the Tenth Circuit also recently interpreted K.S.A. 82a-706b as conferring upon the chief engineer the immediate and non-discretionary duty to protect the Refuge Water Right. In 2021, Petitioner filed suit in federal court seeking, among other remedies, an order requiring the protection of the Refuge Water Right. The Tenth Circuit recently dismissed the case as moot, basing its dismissal upon two findings. As a matter of fact, it found that the 2020 MOA, which sought to accomplish "augmentation" pursuant to K.S.A. 82a-706b(a)(2), was no longer operative: "all material terms of the MOA have since expired . . . ." *Audubon of Kansas, Inc. v. United States Dep't of Interior*, 67 F.4th 1093, 1103 (10th Cir. 2023). As a matter of law, the 10th Circuit held that the Service's 2023 request to secure water imposed upon the chief engineer the non-discretionary duty to administer water rights by priority. *Audubon of Kansas, Inc.*, 67 F.4th at 1106-07. The Tenth Circuit observed that under K.S.A. §§ 82a-706 and 82a-706b:

> Though the Water Division may exercise discretion in administering water rights, it still 'ha[s] a legal obligation to secure water to senior users." App. vol. 2 at 383. Under Kansas law, the chief engineer of the Water Division "*shall* enforce and administer [Kansas] laws . . . pertaining to the beneficial use of water and *shall* control, conserve, regulate, allot and aid in the distribution of water resources . . . in accordance with the rights of priority of appropriation." Kan. Stat. Ann. § 706 (emphases added). In the Rattlesnake Creek subbasin, the chief engineer can choose to combat unlawful diversion of water by allowing augmentation "if … available and offered voluntarily." § 82a-706b(a)(2). Still, the chief engineer must honor the law on priority water rights. § 82a-706. We read the statute to mean that if an augmentation remedy isn't available in the Rattlesnake Creek subbasin, the chief engineer must, as needed to protect senior water rights from unlawful diversions, "[d]irect that the headgates, valves or other controlling works of any ditch, canal, conduit, pipe, well or structure be opened, closed, adjusted or

> regulated." § 82a-706b(a)(1). A senior rights-holder triggers this process by filing a request to secure water. *Id.*

The Tenth Circuit also stressed that KDA-DWR understands "the balance between its discretionary and nondiscretionary powers" as articulated in a letter it sent to GMD5 in 2017. *Id.* at 1107; **Exhibit I**. "This letter reflects the Water Division's understanding that, without the [2020 MOA], the Water Division would have to act to protect the Service's water right upon the Service's request. And the Water Division's past actions support this understanding." *Id.* The Tenth Circuit deemed it necessary to emphasize the non-discretionary nature of the chief engineer's duty in this regard:

> The Water Division enjoys limited discretion under Kansas law, but it always must protect senior water rights above junior rights. *See* § 82a-706 (explaining that the chief engineer must "control, conserve, regulate, allot, and aid in the distribution of the water resources of this state . . . in accordance with the rights of priority of appropriation"). [. . . .] And what's more, the court order Audubon seeks will likely result in enforcement of the Refuge water right because the Water Division must honor senior water rights first. § 82a-706 . . . . *Id.*

The holding of the Tenth Circuit is perfectly consistent with the KWAA and Kansas case law entitling an impaired senior water right to immediate relief under the prior appropriation doctrine as set forth above. K.S.A. §§ 82a-706; 82a-706b; *Garetson II,* 56 Kan.App.2d 623 (2019); *Garetson I*, 51 Kan.App.2d 370 (2015). As set forth below in Part II.f, it is also consistent with the doctrine of prior appropriation across the West.[3]

[3] The Honorable Judge Gregory A. Phillips, author of the Tenth Circuit opinion, previously served as Wyoming Attorney General between 2011 and 2013. The State of Wyoming established the prior appropriation doctrine in its constitution at statehood in 1890. WYO. CONST. art. 1, § 31, and art. VIII *passim.* In his capacity as Attorney General, he defended the state in *Montana v. Wyoming & South Dakota,* No. 137 Orig., a case which substantially engaged the operation of the prior appropriation doctrine across the Yellowstone River Basin. 563 U.S. 368 (2011); 138 S.Ct. 758 (2018).

f. Kansas water law is consistent with other prior appropriation jurisdictions in requiring the immediate administration of junior rights to protect senior water rights in times of shortage.

Other prior appropriation jurisdictions similarly require the state water engineer to immediately administer junior rights. Idaho, which like Kansas defines water rights as real property rights and has codified the prior appropriation doctrine for both surface and groundwater, provides a most apt line of cases. In *Musser v. Higginson,* 125 Idaho 392, 871 P.2d 809 (1994), the Idaho Supreme Court affirmed the issuance of a writ of mandate ordering the director of the state's department of water resources to shut down junior groundwater rights that were impairing a senior surface right pursuant to the relevant statute, whose substance is essentially identical to the mandates contained in K.S.A. §§ 42-329, 82a-706, and 82a-706b:

> It shall be the duty of the director of the department of water resources to have immediate direction and control of the distribution of water from all of the streams, rivers, lakes, ground water and other natural water sources in this state to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water shall be accomplished either (1) by watermasters . . . or (2) directly by employees of the department of water resources under authority of the director . . . . The director must execute the laws relative to the distribution of water in accordance with the rights of prior appropriation . . . ."

Idaho Code § 42-602. The trial court issued a writ of mandate commanding the director to "immediately comply" with the statute according to the prior appropriation doctrine. *Musser,* 871 P.2d at 811. In affirming, the Idaho Supreme Court concluded "that the director's duty to distribute water pursuant to this statute is a clear legal duty." It had little patience with the contention that the director was entitled to discretion in responding to senior rights' calls for water.

> For more than three-quarters of a century, the Court has adhered to the following principle: "The fact that certain details are left to the discretion of the authorities does not prevent relief by *mandamus*." *Beem v. Davis,* 31 Idaho 730, 736, 175 P. 959, 961 (1918) (emphasis in original). *See also Moerder v. City of Moscow,* 74 Idaho 410, 415, 263 P.2d 993, 998 (1953) ("Public officials may, under some circumstances, be compelled by writ of mandate to perform their official duties, although the details of such performance are left to their discretion.") This principle

> applies in this case. The director's duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water. *Id.*, at 813.

In defending the right of senior rights to obtain immediate relief through priority administration, the Idaho Supreme Court has repeatedly stressed that the failure to administer junior rights is a clear taking of property. "In Idaho, water rights are real property." *Olson v. Idaho Dept. of Water Resources,* 105 Idaho 98, 101, 666 P.2d 188 (1983); Idaho Code § 55-101. "When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor." *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336 (1915). "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. State, Dept. of Water Resources,* 103 Idaho 384, 388, 647 P.2d 1256 (1982). "When there is insufficient water to satisfy both the senior appropriator's and the junior appropriator's water rights, giving the junior appropriator a preference to the use of water constitutes a taking for which compensation must be paid." *Clear Springs Foods, Inc., v. Spackman,* 150 Idaho 790, 798, 252 P.3d 71 (2011) (citing *Montpelier Milling Co. v. City of Montpelier,* 19 Idaho 212, 219, 113 P. 741(1911)).

Western courts have consistently required immediate priority administration despite the economic consequences for junior rights. That is because the prior appropriation doctrine demands it. K.S.A. 82a-707(c). After the Colorado Supreme Court held that junior water rights without an augmentation plan could not avoid priority administration, the state engineer shut down junior wells across the Arkansas and South Platte River Basins, including 3,700 out of the 8,200 permitted wells in the South Platte alluvium. *Kobobel v. Dep't of Natural Resources,* 249 P.3d 1127, 1136 (Colo. 2011); *Simpson v. Bijou Irrigation Co.,* 69 P.3d 50 (Colo. 2003); *Empire Lodge*

Homeowners' Ass'n v. Moyer, 39 P.3d 1139 (Colo. 2001). In *Kobobel,* junior rights holders claimed that priority administration constituted a regulatory taking, but the Colorado Supreme Court decisively rejected that claim:

> We are not unmindful of the devastating impact that the cease and desist orders have had on the [junior] well owners, who find themselves without irrigation water from their wells. However, to conclude that the State's cease and desist orders here amounted to an unconstitutional taking necessarily would require us to rule that the well owners had an unfettered right to use water in derogation of senior water rights holders. Such a ruling would disregard Colorado's time-honored prior appropriation doctrine.

Kobobel, 249 P.3d at 1139. When groundwater pumpers in Idaho sought to avoid priority administration to protect senior surface rights in the Snake River Basin, they similarly invoked the economic value of their rights. But the Idaho Supreme Court rejected this argument, and upheld the state water engineer's order to administer junior rights. Considerations of economic impact are inconsistent with the doctrine of first in time, first in right. *Clear Springs Foods, Inc. v. Spackman,* 150 Idaho 790, 802, 252 P.3d 71 (2011).

g. K.A.R. 5-4-1(e)(3) contradicts and is inconsistent with the statutory powers of the chief engineer and is thereby void.

As detailed above, K.S.A. §§ 82a-706, 82a-706b, and 42-329 impose the non-discretionary duty to immediately administer by priority all junior water rights determined to be impairing a senior right until that right is no longer impaired. *See* Parts II.a-b. Yet K.A.R. 5-4-1(e)(3) provides that the chief engineer "may consider regulating the impairing rights the next year and rotating water use among rights." The Respondent may be depending upon this subsection, but he has not cited it. **Exhibit S.** But for the reasons set forth below, it is both legally void and factually inapplicable.

K.A.R. 5-4-1(e)(3) contradicts the clear language and meaning of the aforementioned statutes and is thereby void. "Those rules or regulations that go beyond the statutory authorization

[of the agency] violate the statute, or are inconsistent with the statutory powers of the agency, have been found void." *Pemco, Inc., v. Kansas Dept. of Revenue,* 258 Kan. 717, 720, 907 P.2d 863 (1995). An administrative agency with the power to adopt regulations lacks the authority "to adopt regulations which exceed the statutory authority granted in the first instance. As said in *Grauer,* 'water cannot rise above its source.'" *Wesley Medical Center v. Clark,* 234 Kan. 13, 18-19, 669 P.2d (1983) (quoting *Grauer v. Director of Revenue*, 193 Kan. 605, 608, 396 P.2d 260 (1964)).

There is no statutory authority for any delay or avoidance of priority administration in this case. Under K.S.A. 82a-706, the chief engineer "*shall* enforce and administer" Kansas water law, and "*shall* control, conserve, regulate, and aid in the distribution of water . . . in accordance with the rights of prior appropriation." (emphasis added.) The right to require the administration of juniors is clear: "the first in time is the first in right." K.S.A. 82a-707(c). As described above, K.S.A. §§ 82a-706b and 42-439 mandate the specific and immediate performance of these duties. None of these statutes mentions or impliedly countenances delay.

Where the legislature has allowed deviation from the strict rule of immediate priority administration, it has made that allowance clear. It did so in K.S.A. 82a-706b(a)(2), by providing for "augmentation" as a potential alternative; but as a factual matter, augmentation is not an available alternative in this case, and so priority administration must take place. **Exhibit Q; Exhibit O;** *Audubon of Kansas, Inc. v. United States Dep't of Interior*, 67 F.4th 1093, 1106-07 (10th Cir. 2023). Elsewhere, the legislature has provided for alternatives to strict priority administration. In the statutes setting forth the procedures for establishing Intensive Groundwater Use Areas and Local Enhanced Management Areas, the chief engineer is explicitly allowed to order the rotation of water rights and to deviate from strict priority administration "insofar as may be reasonably done . . . ." K.S.A. §§ 82a-1038(b)(2), (b)(4), 82a-1041(f)(2), (f)(4). But neither

statute applies in this case, because neither such area has been established within the Basin. Hence, the regulatory allowance for rotation and delay in K.A.R. 5-4-1(e) has no application to K.S.A. 82a-706b and is thereby void.

Finally, even if this Court were to consider granting the chief engineer this contradictory regulatory leeway, as a factual matter the chief engineer has already exhausted it: neither former chief engineer Barfield nor Respondent has issued any curtailment orders pursuant to K.A.R. 5-4-1(e)(1) since at least 2016, when Barfield issued the Impairment Report. Respondent's time is up: any delay enables unlawful diversions by junior rights, in clear violation of K.S.A. 82a-706b(a). The chief engineer's statutory duty is to enforce and administer the KWAA, not to avoid and violate it. K.S.A. 82a-706.

III. The chief engineer has a complete plan to administer junior rights across the Basin, and so there is no factual basis for delay.

As described in the Petition, former chief engineer Barfield and his staff at KDA-DWR developed a complete plan in 2019 to administer the junior rights in the Basin that are impairing the Refuge Water Right. **Exhibit M**. This plan is based upon the groundwater model developed by GMD5 and modified by KDA-DWR, and uses the analyses that produced the conclusions contained in the Impairment Report.

Kansas water-use data is the envy of the world. KDA-DWR has complete information on every non-domestic water right in the Basin: every well must be permitted and metered, and every right owner must submit water use reports annually. **Exhibit C**; K.S.A. §§ 82a-728, 82a-732. Furthermore, the Kansas Geological Survey has developed the Kansas Master Groundwater Well Inventory, a central repository that combines the state's groundwater well datasets completely within a single resource. *See* https://geohydro.kgs.ku.edu/geohydro/master_well/index.cfm. Using these and other resources, KDA-DWR has a complete and effective understanding of the

hydrogeological dynamics of the Basin—more than enough to deploy the 2019 administration plan immediately. As KDA-DWR itself has publicized, it has pinpointed every water right that is impairing the Refuge Water Right. **Exhibit M**. Most importantly, this data reveals a shocking decline in groundwater levels in the Basin—as much as ten feet annually. Kansas Geological Survey, *Groundwater levels fall across western and south-central Kansas,* at https://www.kgs.ku.edu/General/News/2023/water-levels.html. Despite the chief engineer's claims that more information is needed, **Exhibit S**, there is no defensible excuse for delay in implementing the 2019 administration plan. It can be deployed today.

CONCLUSION

Kansas law imposes upon the chief engineer the non-discretionary duty to administer immediately water rights according to priority whenever he determines that a senior water right is impaired by junior rights and the holder of a senior right files a request to secure water. The chief engineer has determined that the Refuge Water Right is impaired, and the Service has filed a request to secure water. Therefore, this Court must order the Respondent to immediately administer junior water rights in the Basin that are impairing the Refuge Water Right until it is no longer impaired. He can do so because KDA-DWR has a complete plan ready to deploy across the Basin. It is well past time to stop admiring the pressing problem of the impairment of the Refuge Water Right. It is now time for this Court to enforce the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of June, 2023, a copy of the above and foregoing was sent by U.S. First Class Mail, postage prepaid to:

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